

No. 42751-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Russel Ford,

Appellant.

Grays Harbor County Superior Court Cause No. 11-1-00177-9

The Honorable Judge F. Mark McCauley

Appellant's Opening Brief

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U.S. Const. Amend. IV	1, 4, 5, 6, 7, 8
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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Ford's motion to suppress.
2. The police violated Mr. Ford's right to privacy under Wash. Const. Article I, Section 7 by searching his backpack without a warrant, based on the consent of someone who lacked authority to consent.
3. The police violated Mr. Ford's Fourth Amendment right to be free from unreasonable searches and seizures by searching his backpack without a warrant, based on the consent of someone who lacked authority to consent.
4. The trial court erred by adopting Conclusion of Law No. 3.
5. The trial court erred by adopting Conclusion of Law No. 4.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A consent search is invalid under Wash. Const. Article I, Section 7 unless based on the consent of a person with actual authority over the property searched. Here, police searched Mr. Ford's backpack based solely on the consent of Ms. Alvarado, who lacked actual authority to consent to the search. Did the police violate Mr. Ford's Fourth Amendment right to be free from unreasonable searches and seizures and his right to privacy under Article I, Section 7?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Russel Ford was a passenger in a car driven by Alina Alvarado in Hoquiam on February 16, 2011. CP 3. Officers were watching the house from which the car departed, hoping to find and arrest a Mr. Torrance, who had warrants. RP¹ 6.

Officer Dayton pulled in facing Alvarado's car in a parking lot, and both the officer and Alvarado got out of their cars. RP 8, 17. He asked her about Torrance, and saw Russel Ford in the passenger seat. Dayton recognized Mr. Ford, discovered a warrant for his arrest, and placed him in the back seat of his car. CP 4.

Officer Dayton also smelled marijuana from the car, and asked Alvarez for consent to search it. CP 4. She assented. CP 4, 7.

There was a closed backpack in the backseat on the passenger side. RP 12. Without asking Alvarado who the pack belonged to, Dayton searched it. RP 18, 21. Heroin was found in the pack, as well as a card from Alvarado to Mr. Ford, and some other documents relating to Mr. Ford. RP 12; CP 4-5.

¹ The only volume of the Verbatim Report of Proceedings cited in this brief is from October 13, 2011.

The state charged Russel Ford with Possession of Heroin. CP 1. Mr. Ford moved to suppress the evidence, arguing that Alvarado's consent could not extend to the closed backpack in the car. Motion to Suppress, Memorandum in Response, Supp CP; CP 7.

At the hearing, Officer Dayton testified that Alvarado gave consent to a search of the car, which he considered included closed containers within, though that was not listed on the form she signed. RP 12, 21-22; CP 7. He said that he did not ask whose pack it was before he searched it, and noted that it did not contain any markers of ownership on the outside of it. RP 18, 21. Dayton also testified that he did not ever see Mr. Ford reach for the pack or touch it, and that he did not ask him for permission to search it. RP 18-19.

The court denied the motion to suppress. CP 3-6.

The charge was tried to a jury, which convicted Mr. Ford. CP 8. After sentencing, Mr. Ford timely appealed. CP 8-16, 17-18.

ARGUMENT

THE WARRANTLESS SEARCH OF MR. FORD’S BACKPACK VIOLATED HIS RIGHT TO BE FREE FROM UNREASONABLE SEARCHES UNDER THE FOURTH AMENDMENT AND HIS RIGHT TO PRIVACY UNDER WASH. CONST. ARTICLE I, SECTION 7.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). The validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008).

Findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.* In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002).

B. Warrantless searches are presumed to be unconstitutional.

Under the Fourth Amendment to the U.S. Constitution,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.²

Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.³ *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under both constitutional provisions, searches and seizures conducted without authority of a search warrant “‘are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.’” *Arizona v. Gant*, 556 U.S. 332, ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without

² The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

³ Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

Consent is one exception to the warrant requirement. *State v. Schultz*, 170 Wash. 2d 746, 754, 248 P.3d 484, 487 (2011). The state and federal constitutions impose different requirements on consent searches. In this case, the officer's search of Mr. Ford's backpack was not justified under either constitutional provision.

C. The prosecution failed to establish an exception to the warrant requirement under either Article I, Section 7 or the Fourth Amendment.

Under Article I, Section 7, only a person with actual authority may consent to a search of another's property. *State v. Morse*, 156 Wash. 2d 1, 12, 123 P.3d 832, 837 (2005).⁴ Where police seek to avoid the warrant

⁴ This is in contrast to the Fourth Amendment, which permits police to search when the consenting party has apparent authority. *Morse*, at 12. The "apparent authority" doctrine is inapplicable under Article I, Section 7. *Id.*

requirement by obtaining consent from someone they believe to be authorized to consent, the burden to establish such authority rests with the prosecution. *See, e.g., State v. White*, 141 Wash. App. 128, 136, 168 P.3d 459 (2007).

In this case, the prosecution did not establish that Ms. Alvarado had actual authority to consent to a search of Mr. Ford's backpack. RP 4-39. Nor did her ownership of the vehicle empower her to consent to a search of his property. *State v. Rison*, 116 Wash. App. 955, 957-58, 69 P.3d 362, 363 (2003).⁵

In *Rison*, a man named Farrell consented to a search of his apartment. While conducting the search, police found and opened an eyeglass case belonging to the defendant, and discovered psilocybin mushrooms. *Id.* at 958. The Court of Appeals held, *inter alia*, that Farrell did not have actual authority to consent to a search of the eyeglass case, and suppressed the evidence. *Id.* at 961.⁶

⁵ Although *Rison* mentioned Article I, Section 7 in passing, the case was apparently decided on Fourth Amendment grounds. Had the decision rested on state constitutional grounds, the court would not have needed to reach the "apparent authority" argument. *Rison*, at 961-962. Nonetheless, *Rison*'s discussion of actual authority is applicable here.

⁶ In reaching this conclusion, the court noted that "[a]n apartment tenant has authority to consent to a search of his apartment... He has no authority, however, to consent to search another's property." *Rison*, at 957-958.

The lower court erroneously concluded that Ms. Alvarado had authority to consent to a search of the backpack. CP 5. This is incorrect. First, the prosecution failed to prove that Alvarado had actual authority over the backpack—there is no indication that the two shared the backpack, or that it belonged to her alone.⁷ Second, Alvarado’s ownership of the car did not allow her to consent to search containers within the car that did not belong to her. *Rison*, at 957-958, 961.

Even if the Fourth Amendment doctrine of apparent authority applied under Article I, Section 7, Alvarado’s consent would be insufficient to justify the search in this case. To sustain a consent search under the apparent authority doctrine, a reviewing court must find that the facts available to the officer(s) at the time of the search “would justify the belief in a person of reasonable caution that the consenting party had authority.” *Rison*, at 962. At the time of the search, there was no indication that Alvarado was the owner of the backpack. As in *Rison*, the officer had just removed another person from the area, without instructing him to take his personal effects with him. *Id.*, at 962. Under these circumstances, the police were not justified in concluding that Alvarado

⁷ To prove actual authority under the “common authority” test, the prosecution must show mutual use of the property by persons generally having joint access or control for most purposes. *White*, at 136; *Rison*, at 961.

had authority to consent to a search of the backpack; a person of reasonable caution would have concluded that the backpack may well have belonged to Mr. Ford and not to Ms. Alvarado.

Ms. Alvarado's consent did not authorize police to search Mr. Ford's backpack. *Id.* The search of the backpack was therefore unlawful under Article I, Section 7. *Morse, supra.* Mr. Ford's conviction must be reversed and his case dismissed with prejudice. *Id.*

CONCLUSION

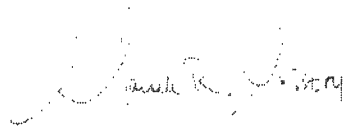
For the foregoing reasons, Mr. Ford's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on April 9, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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And that I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 9, 2012.



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April 09, 2012 - 9:27 AM

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